

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MASSACHUSETTS BAY INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

v.

WALFLOR INDUSTRIES, INC., a
Washington corporation; JOHN URAL, an
individual; JAMES HEWITT, an individual;
and MICHAEL CZERWINSKI, an
individual,

Defendants.

No.: _____

COMPLAINT FOR DECLARATORY
RELIEF (DUTY TO DEFEND)

JURY DEMAND

Plaintiff Massachusetts Bay Insurance Company alleges as follows:

I. PARTIES

1.1 Plaintiff Massachusetts Bay Insurance Company ("Massachusetts Bay") is an insurance company licensed to insure risks in the State of Washington. Massachusetts Bay is incorporated in New Hampshire and has its principal place of business in Massachusetts. For purposes of diversity jurisdiction, Massachusetts Bay is a citizen of both New Hampshire and Massachusetts. Massachusetts Bay issued certain Business Owner Policies to Defendant Walflor Industries ("Walflor").

1.2 Defendant Walflor is a corporation organized and existing under the laws of the State of Washington. The insurance policies issued to Defendant Walflor indicate its address is at 1387 Pacific Dr. in Arlington, Washington.

1.3 Defendant John Ural ("Ural") is an individual and a resident of the State of Washington.

1.4 Defendant Mike Czerwinski ("Czerwinski") is an individual and, upon information and belief, a resident of the State of Washington.

1.5 Defendant Jim Hewitt ("Hewitt") is an individual and, upon information and belief, a resident of the State of Washington.

II. JURISDICTION AND VENUE

2.1 Jurisdiction is proper pursuant to 28 U.S.C. § 1332. Upon information and belief, the matter in controversy exceeds \$75,000, exclusive of interests and costs, and the controversy is between citizens of different states.

2.2 Venue is proper in the United States District Court for the Western District of Washington pursuant to 28 U.S.C. § 1391. Defendant Walflor resides in Skagit County in the Western District of Washington and a substantial part of the events giving rise to this claim occurred in Skagit County in the Western District of Washington.

III. FACTS

A. Plaintiff Massachusetts Bay issued a Business Owner Policy to Walflor.

3.1 Massachusetts Bay issued a Business Owners Policy to Defendant Walflor for the period of 12/08/2015-16 (Policy No. OD2-A797754-00). Walflor renewed the policy for the period of 12/08/2016-17 (Policy No. OD2-A797754-01). The insurance policies issued by Massachusetts Bay to Walflor will be referred to together as the "Policies."

3.2 Subject to their terms, conditions, limitations and exclusions, the Policies provide Business Liability Coverage with the following Limits of Insurance: Aggregate Limit \$2,000,000 and an Each Occurrence Limit of \$1,000,000.

3.3 The Policies provide substantially the same pertinent coverage forms, terms, conditions, limitations, and exclusions.

3.4 The Policies' Business Liability Coverage provides in relevant part:

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", "property damage" or "personal and advertising injury", to which this insurance does not apply. We may at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. . . .

b. This insurance applies:

(1) To "bodily injury" and "property damage" only if:

(a) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(b) The "bodily injury" or "property damage" occurs during the policy period. . .

(2) To "personal and advertising injury" caused by an offense arising out of your business, but only if the offense was committed in the "coverage territory" during the policy period.

3.5 "[B]odily injury", "property damage", and "personal and advertising injury" are defined terms within the Policies:

5. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time. . . .

18. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at

the time of the physical injury that caused it;
or

- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property

15. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution¹;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".²

3.6 Even where a loss falls within the Policies' insuring agreement, coverage may be barred by the Policies' exclusions. Possibly relevant, the Policies provide exclusions for Professional Services, Knowing Violation of Rights of Another, Breach of Contract,

¹ In the renewal policy, this offense is defined as "Malicious prosecution or abuse of process."

² In the renewal policy, the additional offense of "Discrimination" is added.

1 Infringement of Copyright, Patent, Trademark or Trademark, Unauthorized Use of Another's
2 Name or Product.

3 **B. Stuc-O-Flex sued Defendants in state court.**

4 3.7 On November 29, 2017, Stuc-O-Flex filed a complaint against Defendants and
5 others in King County Superior Court under Case No. 17-2-30700-9 SEA (the "Underlying
6 Lawsuit"). The Underlying Complaint is attached as Exhibit A to this Complaint.

7 3.8 In the Underlying Complaint, Stuc-O-Flex alleges that it had an exclusive
8 distributorship agreement with Waterway Rainscreen ("WR") (the "Agreement"). Through a
9 series of transactions, the operations of WR were transferred to different entities, including
10 Walflor for a period of time.

11 3.9 Stuc-O-Flex alleges that Walflor, Ural, Hewitt, and Czerwinski were alter egos
12 of one another. Stuc-O-Flex alleges that Ural was a principal of Walflor and that Hewitt and
13 Czerwinski were owners and operators of Walflor.

14 3.10 Stuc-O-Flex alleges that Walfor obtained WR's assets, assumed obligations
15 under the Agreement, and wrongfully breached the Agreement. Walflor's assets were
16 allegedly subsequently purchased by another entity that also allegedly breached the Stuc-O-
17 Flex Agreement.

18 3.11 Stuc-O-Flex asserts a breach of contract claim against Walflor and other
19 defendants in the Underlying Lawsuit. Based on the purported breach of the Agreement,
20 Stuc-O-Flex asserts claims for tortious interference with business expectancy, trade name
21 infringement, and violation of the Washington Consumer Protection Act against Defendants
22 Walflor, Hewitt, Ural, and Czerwinski, and the other defendants in the Underlying Lawsuit.

23 3.12 Stuc-O-Flex seeks damages in, at least, the sum of \$12,000,000 against the
24 defendants in the Underlying Lawsuit. The Underlying Lawsuit is currently ongoing.

25 /////

1 **C. Massachusetts Bay is providing a defense to Defendants in the Underlying**
 2 **Lawsuit subject to a complete reservation of rights.**

3 3.13 On January 16, 2018, Ural, Hewitt, and Czerwinski sent correspondence
 4 tendering a claim for defense and indemnity to Massachusetts Bay under the Policies. Ural,
 5 Hewitt, and Czerwinski also tendered to Orion Insurance Group. The claims against Walflor
 6 were not tendered to Massachusetts Bay at that time.

7 3.14 Massachusetts Bay responded to the tender in correspondence dated February
 8 26, 2018. In its response, Massachusetts Bay denied coverage based on the Underlying
 9 Complaint. In doing so, Massachusetts Bay explained that the claims asserted in the
 10 complaint did not fall within the Policies' coverage grant and were otherwise barred by the
 11 Policies exclusions. Massachusetts Bay indicated that it would review any additional
 12 information that Ural, Hewitt, and Czerwinski believed relevant to coverage. A copy of
 13 Massachusetts Bay's February 26, 2018 correspondence is attached as Exhibit B to the
 14 Complaint and is specifically incorporated herein.

15 3.15 On April 5, 2018, Ural, Hewitt, and Czerwinski sent correspondence to
 16 Massachusetts Bay in response to Exhibit B. In addition, the claims asserted against Walflor
 17 were tendered to Massachusetts Bay at that time.

18 3.16 On April 13, 2018, Massachusetts Bay responded to the April 5, 2018 letter,
 19 reiterating its position that the claims made against Ural, Hewitt and Czerwinski did not fall
 20 within the Policies' coverage grant and were otherwise barred by the Policies' exclusions and
 21 explaining that there was no coverage for the claims made against Walflor for similar
 22 reasons. Nonetheless, and without waiving any of its rights under the Policies, Massachusetts
 23 Bay agreed to participate in the defense of Defendants in connection with the claims asserted
 24 against them in the Underlying Lawsuit, under a complete reservation of rights, including the
 25 right to deny any duty to defend or to indemnify any insured and to seek a judicial
 26 determination of such rights. The defense is subject to the terms, conditions, exclusions, and

1 limitations of the Policies. A copy of Massachusetts Bay's April 13, 2018 correspondence is
 2 attached as Exhibit C to this Complaint and is specifically incorporated herein.

3 **D. Massachusetts Bay should have no obligations to Defendants under the terms,**
 4 **conditions, limitations, and exclusions of the Policies.**

5 3.17 Massachusetts Bay brings the present action seeking judicial determination
 6 that the claims asserted against the Defendants in the Underlying Lawsuit do not fall within
 7 the Policies' Insuring Agreements or are otherwise barred by the Policies' exclusions on
 8 grounds, including the following:

- 9 • The Underlying Complaint does not seek damages for "bodily injury" or
 10 "property damage" against Defendants.
- 11 • The Underlying Complaint does not allege injury arising out of a "personal
 12 and advertising injury" against Defendants.
- 13 • To the extent the Underlying Complaint could be construed as alleging injury
 14 arising out of "personal and advertising injury," the exclusion for Breach of
 15 Contract applies to exclude coverage.
- 16 • To the extent the Underlying Complaint could be construed as alleging injury
 17 arising out of "personal and advertising injury," the exclusion for Infringement
 18 of Copyright, Patent, Trademark or Trade Secret applies to exclude coverage.

19 3.18 Additional terms, conditions, limitations, and exclusions of the Policies affect
 20 coverage and Massachusetts Bay reserves its right to assert those terms, conditions,
 21 limitations, and exclusions in this declaratory action.

22 **IV. CLAIM FOR DECLARATORY RELIEF**

23 4.1 Massachusetts Bay incorporates by reference and re-alleges the allegations
 24 contained in the preceding paragraphs.

25 4.2 The allegations in this Complaint present a justiciable controversy subject to
 26 declaratory relief. Upon information and belief, the matter in controversy exceeds \$75,000,

1 exclusive of interest and costs, and the controversy is between parties who are citizens of
2 different states.

3 4.3 Massachusetts Bay is entitled to a declaration that it has no obligation to
4 defend Defendants under the Policies.

5 **V. CLAIM FOR REIMBURSEMENT OF DEFENSE COSTS INCURRED**

6 5.1 Massachusetts Bay incorporates by reference and re-alleges the allegations
7 contained in the preceding paragraphs.

8 5.2 The Policies contain an endorsement entitled Washington Changes – Defense
9 Costs, which provides:

10 The following applies to any provision in the Policy, or in any
11 endorsement attached to this Policy, that sets forth a duty to
defend.

12 If we initially defend an insured or pay for an insured's defense
13 but later determine that none of the claims, for which we
14 provided a defense or defense costs, are covered under this
insurance, we have the right to reimbursement for the defense
costs we have incurred.

15 The right to reimbursement under this provision will only apply
16 to the costs we have incurred after we notify you in writing that
17 there may not be coverage and that we are reserving our rights
to terminate the defense or the payment of defense costs and to
seek reimbursement for defense costs.

18 5.3 In its reservation of rights letter (Exhibit C), Massachusetts Bay stated that it
19 had determined that there may not be coverage under the Policies for any of the damages
20 sought in the Underlying Lawsuit and it reserved its right to terminate the defense of
21 Defendants and to seek reimbursement of the defense costs paid.

22 5.4 Massachusetts Bay is entitled to reimbursement of all defense costs it has paid
23 in connection with its defense of Defendants.

24 **VI. RESERVATION OF RIGHTS**

25 Massachusetts Bay reserves the right to assert other claims as appropriate.
26

VII. JURY DEMAND

Massachusetts Bay requests trial by a jury.

VIII. REQUEST FOR RELIEF

Massachusetts Bay respectfully requests:

7.1 That the Court enter a judgment declaring that Massachusetts Bay has no duty to defend Defendants in the Underlying Lawsuit.

7.2 That the Court award Massachusetts Bay all sums it has paid in connection with the defense of the Defendants in the Underlying Lawsuit.

7.3 That the Court award Massachusetts Bay the fees and costs it incurred in bringing this action.

7.4 That the Court grant Massachusetts Bay such further relief as is just and equitable.

DATED: May 30, 2018

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